

February 25, 2015

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Reference No.: 14-0063

Ms. Holly L. Camp, President
Roy Keith Electric Company
[REDACTED]
Farmington, IL 61531

Dear Ms. Camp:

This letter responds to your January 14, 2014, correspondence on behalf of your firm, Roy Keith Electric Company (RKEC), appealing the Northeast Illinois Regional Commuter Railroad Corporation's (METRA)¹ October 15, 2013, denial of the firm's application for certification as a Disadvantaged Business Enterprise (DBE) under the rules of 49 C.F.R. Part 26 (the Regulation). METRA denied RKEC's application on the grounds that you did not demonstrate control of the firm as required by §26.71.² We affirm METRA's decision because substantial evidence in the administrative record supports the denial.³ **RKEC may reapply to the DBE program as the appropriate waiting period has past.**⁴

Pertinent Facts

RKEC's Uniform Certification Application (UCA) filed with METRA in March 2013, sets forth the following pertinent facts. RKEC, established in 1985, is an electrical contracting firm engaged in services involving residential repair; commercial and industrial work; generators, fire alarms, security, Tele/Data, and electrical supply. (UCA, p. 3). You are the firm's 74.68% owner and your sister-in-law Ms. Monica A. Keith, owns the remaining 25.32% of stock.

Your non-disadvantaged husband, Mr. Stanley E. Camp, is the firm's Vice President and Secretary. Mr. Camp has been an electrician for over 26 years and worked at RKEC his entire career (Camp Résumé). For 17 of those years, he has been a project manager. His duties include estimating, project management, assisting in business transactions, and overseeing all field

¹ METRA is a member of the Illinois Unified Certification Program.

² Regulation §26.61(b) requires that applicant firms satisfy each eligibility requirement. The firm's failure to meet its burden of proof regarding any substantive certification requirement results in a determination that it is ineligible.

³ As regulation §26.89(f)(1) requires. We base our decision solely on the entire administrative record, per §26.89(e).

⁴ The subject of this appeal is RKEC's eligibility for the DBE program as an electrical contractor although there is some evidence in the record that RKEC also is engaged in supplying materials. This aspect of the firm's eligibility is unclear but one that can be clarified in the event the firm reapplies.

employees. He shares with you the functions of estimating and bidding; negotiating and contract execution; and field/production operations supervision. (UCA p. 7). You are listed as solely responsible for financial decisions; hiring/firing of management personnel; office management; marketing/sales; and purchasing of major equipment. (UCA p. 7)

Your résumé contained in the record indicates you were employed with Whitney Veterinary Hospital from 1990 to 2009 after graduating from Monmouth College in 1989 with a major in biology. Your duties since 2002—when you became employed at RKEC—include: “entire office supervision; receivables; payables; payroll; taxes; decision making on all business and financial transactions; oversee[ing] all office employees; oversee[ing] all outgoing quotations; all accounting, insurance, and bonding necessities, as well as safety within the business.”

METRA’s on-site interview with you occurred on August 15, 2013; and you confirmed many of the office related duties at RKEC you listed on the UCA. Your duties and responsibilities as President are described as: “accounts receivable; payroll; union reports; state and federal taxes; oversee all financials related to projects and estimates that go out of the office. All matters dealing with employees such as hiring, firing, benefits and the local union. She is the safety coordinator, signs all checks; does the marketing, and makes the short/long term financial decisions.” (On-Site Report, p. 1). METRA inquired during the interview how you obtained the experience to operate this type of firm; and the agency recorded on page 2 of its report: “on-job training and on-line training. She started working with the company in 1985 as a truck driver/office assistant and worked her way up. Ms. Camp stated she always needed the help of her electrical supervisors or foremen to answer questions of a technical nature because she did not have formal training in electricity.”

Besides Mr. Camp, other non-disadvantaged individuals hold positions at the firm.

Robert R. Keith, a non-disadvantaged individual who founded RKEC, is also an electrician. Mr. Keith notes he is currently retired from the firm, however; the firm lists him on page 10 of the UCA as holding the firm’s contractor’s license. Ken Swanson began working at RKEC in 2009. He performs estimating and is a journeyman field electrician. Dave Sheckler has worked with RKEC since 1997, having served 7 other electrical firms in his career beginning in 1977. Finally, your brother, Brian R. Keith, is a registered professional engineer, currently working for Keith Engineering Design, where he oversees all electrical engineering. He has over 19 years in designing institutional, industrial, and commercial electrical systems for healthcare related projects. He also has 10 years’ experience as a project manager, design engineer, and estimator in electrical contracting.

During METRA’s on-site interview, you describe the duties and background of these individuals as: “Stanley Camp is Vice President, a director, field supervisor, estimator and project manager. Ken Swanson is lead estimator and lead field electrician. Dave Scheckler is a lead field electrician. Robert Roy is supervising electrician. Stanley Camp has been a certified electrician for 26 years. Ken Swanson 40 years, Dave Sheckler 36 years and Robert Roy Keith 50 years.”

METRA cited §§26.71(e), (g), and (k) in its DBE certification denial decision, referencing the

firm's failure to demonstrate sufficient control, namely: (1) You lack sufficient experience to control critical areas of the firm's primary operations, management, and policymaking; (2) non-disadvantaged individuals are relied upon for their knowledge and background to control the technical (electrical) aspects of RKEC's operations; (3) your experience is primarily in office administration and billing with no prior experience in the firm's industry; and (4) RKEC is a family operated business and it cannot be determined that you—as distinct from the family as whole—control the firm.

Rebuttal

In your appeal of January 14, 2014, you describe how you control all facets of the business to include in your words: “financial decisions, legal decisions, payroll, payables, receivables, taxes, vehicle maintenance, insurance, inventory, material and office purchases, union reporting, management of electricians, hiring and layoffs of employees, change orders, contract approval and signing, bonding and submitting quotes.” You also state that outside of office functions you are responsible for material inventory on the job site, making sure the electricians have necessary equipment. You stated: “I am not an electrician; however, I do oversee the electricians and the work that is performed both in the office and in the field. The operation and management of the company is far greater than simply being a trained electrician.” You clarified the role of the non-disadvantaged individuals mentioned above as follows:

The position of Stan Camp in the company is a hired union electrician who holds responsibilities of estimating and field supervision of the electricians on the field projects. He does have authority to sign contracts which are approved by me prior to his signature. If Stan was not in the office estimating, and supervising the field electricians, there would be another electrician in his place. All electrical contracting businesses require estimators and supervisors. Stan is the Vice President and Secretary of RKEC as well, but his legal position for the business does not dictate who makes decisions on a day-to-day basis or who makes the major decisions for the business. I was the one who decided to elect him as Vice President and Secretary of RKEC.

Stan is also a co-signer for the line of credit with the Bank of Farmington, and that decision was made as a contingency plan in case anything was to happen to myself. As far as the life insurance policy, that was a decision made prior to my move into the presidency and I decided to keep the policy finding it to be beneficial to the company. I have been pursuing a policy for myself, but I have not yet made a decision on that policy.

Ken Swanson is not the lead estimator. Stan and Ken estimate the same number and same size of jobs within the business, however, I am completely involved in each and every bid process that enters and exits our office.

Robert R. Keith has been retired since October 2009, and no longer supervises, estimates or consults with any employee of RKEC. There is no longer any storage of material on his premise or rental of any of his personnel equipment.

Second, with regard to my reliance on non-eligible parties, I am dependent on hired electricians to fulfill the work load in the field, and I am also dependent on hired estimators to quote jobs, but I am not dependent on any of the employees for making the decisions that affect the health of the business. I take advice from many parties such as my attorney, my accountant, my insurance agent, my bonding agent, and my banker, but none of that advice dictates who makes the final decisions for RKEC.” (Rebuttal Letter, Jan. 14, 2014)

Discussion

§26.61(b): The firm seeking certification has the burden of demonstrating to you, by a preponderance of the evidence, that it meets the requirements of this subpart concerning group membership or individual disadvantage, business size, ownership, and control.

Control

§26.71(a): In determining whether socially and economically disadvantaged owners control a firm, you must consider all the facts in the record, viewed as a whole.

§26.71(e): Individuals who are not socially and economically disadvantaged or immediate family members may be involved in a DBE firm as owners, managers, employees, stockholders, officers, and/or directors. Such individuals must not, however possess or exercise the power to control the firm, or be disproportionately responsible for the operation of the firm.

§26.71(g): The socially and economically disadvantaged owners must have an overall understanding of, and managerial and technical competence and experience directly related to, the type of business in which the firm is engaged and the firm’s operations. The socially and economically disadvantaged owners are not required to have experience or expertise in every critical area of the firm’s operations, or to have greater experience or expertise in a given field than managers or key employees. The socially and economically disadvantaged owners must have the ability to intelligently and critically evaluate information presented by other participants in the firm’s activities and to use this information to make independent decisions concerning the firm’s daily operations, management, and policymaking. Generally, expertise limited to office management, administration, or bookkeeping functions unrelated to the principal business activities of the firm is insufficient to demonstrate control.

§26.71(k): (1) A socially and economically disadvantaged individual may control a firm even though one or more of the individual's immediate family members (who themselves

are not socially and economically disadvantaged individuals) participate in the firm as a manager, employee, owner, or in another capacity. Except as otherwise provided in this paragraph, you must make a judgment about the control the socially and economically disadvantaged owner exercises vis-a-vis other persons involved in the business as you do in other situations, without regard to whether or not the other persons are immediate family members.

(2) If you cannot determine that the socially and economically disadvantaged owners—as distinct from the family as a whole—control the firm, then the socially and economically disadvantaged owners have failed to carry their burden of proof concerning control, even though they may participate significantly in the firm's activities.

The firm bears the burden of demonstrating by a preponderance of evidence per §26.61(b) that you, as the majority disadvantaged owner, possess an overall understanding of, and managerial and technical competence and experience directly related to the work RKEC is engaged and its operations, which is a requirement of §26.71(g). You introduced no evidence that this is the case. Accordingly, METRA appropriately determined that the firm is ineligible for certification; and we affirm under §26.89(f)(1).

The pertinent experience and knowledge of electrical contracting rests with the non-disadvantaged employees who are all certified electricians. You failed to make a showing that you are in fact equipped to critically evaluate information presented by them in this type of work and use that information to make independent decisions concerning RKEC's daily operations, management, and policymaking, particularly not in field operational elements.

Substantial evidence supports a determination that the participation and expertise of the non-disadvantaged electricians are indispensable to RKEC and their skills are used precisely in the manner for which the firm has been engaged in so far. It is they who control the operational activities for which the firm seeks certification. There was substantial evidence; all of it provided by the firm and yourself, that your duties are primarily administrative/financial and that your experience and understanding relate primarily to back office functions, not field/production operations. The non-disadvantaged individuals have more substantial duties, as specified in the UCA, résumés, and on-site report (estimating, bidding, field supervision, etc.). There is abundant evidence of shared control responsibilities and delegation to them as they are responsible for day-to-day operations and field supervision. We find that your managerial role in the firm's overall affairs is not such that the METRA reasonably could conclude that you actually exercise control over RKEC within the meaning of the Regulation. The core functions of this firm are undoubtedly in the non-disadvantaged individuals' hands and we affirm METRA's conclusion under §26.71(e) that the firm is ineligible because non-disadvantaged individuals are disproportionately responsible for RKEC's operations.

Finally, the burden is on the applicant to demonstrate that the disadvantaged owner, as distinct from that owner operating in conjunction with various family members, controls the firm. Section 26.71(k). There is abundant evidence of shared control responsibilities and delegation to

non-disadvantaged persons in this electrical firm's entire field operation as described above. Based on the evidence in the record, the Department cannot determine that you—as distinct from your family as a whole—control RKEC.

Substantial evidence supports METRA's conclusion that RKEC did not meet its burden of proof.

CONCLUSION:

The Department affirms, as supported by substantial evidence and not inconsistent with the substantive or procedural provisions concerning certification, METRA's determination that RKEC is ineligible for certification as a DBE. We reach this conclusion based on the firm's failure to satisfy the requirements of §§26.71(e), (g), and (k). This decision is administratively final and not subject to petitions for review.

Sincerely,

Marc D. Pentino, Acting Associate Director
External Civil Rights Programs Division
Departmental Office of Civil Rights

cc: METRA